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TEUKU NAWARDIN SHAMSUAR

v.

PP

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COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
KANG HWEE GEE JCA
AZHAR MA'AH JCA
[CRIMINAL APPEAL NO: B-05-06-2009]

C

19 FEBRUARY 2010

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 491 grams cannabis - Appeal against conviction and death sentence - Whether defence cast a reasonable doubt on prosecution's case*

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The accused was convicted and sentenced to death by the trial judge on a charge of trafficking in 491 grams of cannabis. It was the prosecution case in evidence that the accused was found with the incriminating drug package tucked in front of his waist underneath his pants. Amongst other things, it was argued for the accused that

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the very size of the incriminating package which measured 5.5 cm in width and 17.5 cm in length would have made it impossible for it to be tucked into the tight and slim pants allegedly worn by the accused at the time of his arrest. The accused claimed to have exchanged his tight and slim pants with that of a prison inmate

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who had pressured him to exchange it with him as the inmate had fancied his pants. As such, that led to the doubt on whether the incriminating package was in fact recovered from the accused. The prosecution maintained that the pants the accused claimed to have

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worn in exchange was the same one worn by the accused at the time of his arrest. The accused now appealed against his conviction and sentence passed by the trial judge.

Held (dismissing the appeal; affirming the conviction and sentence passed by trial judge)

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Per Azhar Ma'ah JCA delivering the judgment of the court:

(1) The accused's defence depended entirely on his credibility. Apart from his word there was no evidence that would support the version of his story. The accused apparently did not impress the

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trial judge as a truthful witness. Upon scrutiny of the accused's defence statement, the accused was not telling the truth and

had invented his story to escape the consequences of his criminal act. His defence should be rejected and accordingly the accused failed to cast reasonable doubt on the prosecution's case. (para 24)

Bahasa Malaysia *Translation Of Headnotes*

Tertuduh telah disabit dan dihukum mati oleh hakim bicara atas satu pertuduhan mengedar 491 gram ganja. Adalah menjadi kes pendakwaan seperti yang terserlah dari keterangan bahawa bungkusan dadah berkenaan telah dijumpai terselit di dalam seluar yang dipakai tertuduh, iaitu pada bahagian hadapan pinggangnya. Antara lain-lain perkara, ianya telah dihujahkan bagi pihak tertuduh bahawa berdasarkan kepada saiz bungkusan dadah, yang berukuran 5.5 cm lebar dan 17.5 cm panjang, adalah mustahil bahawa ia boleh diselit ke dalam seluar bersaiz kecil dan ketat yang dipakai oleh tertuduh pada waktu material. Tertuduh mendakwa telah menukar seluar yang dipakainya dengan seluar seorang rakan sepenjaranya, atas desakan pihak terkemudian tersebut yang menyukai seluarnya. Berkaitan itu, maka timbul keraguan sama ada bungkusan memudaratkan tersebut telah sebenarnya dijumpai dari badan tertuduh. Pendakwaan bagaimanapun menegaskan bahawa seluar yang didakwa tertuduh sebagai telah ditukar adalah sebenarnya seluar yang sama yang dipakai oleh tertuduh semasa beliau ditangkap. Tertuduh sekarang merayu terhadap sabitan dan hukumannya.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman yang dijatuhkan hakim bicara)
Oleh Azhar Ma'ah HMR menyampaikan penghakiman mahkamah:

(1) Pembelaan tertuduh adalah bergantung sepenuhnya kepada kredibiliti beliau. Namun, selain dari keterangan beliau sendiri, tidak terdapat keterangan-keterangan lain yang boleh menyokong versi yang dikemukakan olehnya. Tertuduh juga telah gagal menyakinkan hakim bicara bahawa beliau adalah seorang saksi yang boleh dipercayai. Meneliti kenyataan pembelaan tertuduh, jelas bahawa beliau tidak bercakap benar dan telah mereka-reka cerita demi untuk melepaskan diri dari kesan perbuatan jenayahnya. Pembelaan beliau sewajarnya ditolak yang berakibat beliau telah gagal membangkitkan keraguan munasabah terhadap kes pendakwaan.

A **Case(s) referred to:**
Chan King Yu v. PP [2009] 1 CLJ 601 FC ***(refd)***
Ong Ah Chuan v. PP [1980] 1 LNS 181 PC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 39A(2), 39B(1)(a)
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For the accused - Jagdish Kaur; M/s AS Jag & Co
For the prosecution - Wan Shaharuddin Wan Ladin DPP

Reported by Usha Thiagarajah

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JUDGMENT

Azhar Ma'ah JCA:

D **[1]** The accused was convicted and sentenced to death by Shah Alam High Court on a charge of trafficking in 491 grammes of cannabis in the following terms:

> Bahawa kamu pada 9 Oktober 2006, jam lebih kurang 8.30 malam
> E bertempat di hadapan gudang AS Logistics Sdn. Bhd., Lot 1614 dan 1615, Jalan Teluk Kapar, Rantau Panjang, Klang di dalam Daerah Klang, di dalam Negeri Selangor Darul Ehsan, telah didapati memperedarkan dadah berbahaya iaitu 491 gram ganja dan oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh
> F dihukum di bawah Seksyen 39B(2) Akta yang sama.

[2] The facts of the case as summarised by the learned trial judge in his grounds of judgment, read as follows:

> On the 9th October 2006 at about 8.30 p.m. Chief Inspector
> G Mohd. Husni bin Manaf (SP3) together with a six men team of policemen acting on information received conducted a drug trafficking operation at Jalan Teluk Kapar, Rantau Panjang, Klang. They arrived at the location near a factory named AS Logistic (hereinafter called the factory) at about 8.15 p.m. and kept
> H surveillance. The place was brightly lit by the street lights and the factory lights. At about 8.30 p.m. he saw a Yamaha 125Z motorcycle No. BHG 7567 ridden by the accused, stopping in front of the factory. He and his six men team rushed to apprehend the accused. The accused attempted to run but was successfully caught by SP3 and D/L/Kpl. Yatim (SP4) and D/L/Kpl. Rizal. SP3
> I conducted a body search on the accused in the presence of his six men team and found a package wrapped in tin foil plastic and selotape tucked in front of his waist underneath his trousers and

covered by his jacket. SP3 also seized a UNHCR card bearing the name of the accused who is an Indonesian National, the brown jacket worn by the accused, the motorcycle BHG 7567, a crash helmet with the brand name Magnum and a bunch of motorcycle keys. A search list of the items seized was made by him at the Klang Police Station and marked P12. He made markings on the package on the items seized. He made a small incision on the package which was marked P9 to ascertain and confirm that the contents of P9 was cannabis. The items seized were then handed by him to the Investigating Officer Inspector Salmi Nida as evidenced by the Borang Serah-Menyerah marked P15.

The evidence of SP3 that P9 was found on the body of the accused was corroborated by D/L/Kpl. Mat Yatim bin Ali (SP4).

The incriminating package P9 was sent by the Investigating Officer SP5 to the Chemist Suhana binti Ismail (SP2) who after analysing them found that it was cannabis as defined under Section 2 of the Dangerous Drugs Act and confirmed the weight was 491 grams.

[3] On these facts the learned trial judge was satisfied that the prosecution has successfully proven a *prima facie* case on the charge of trafficking against the accused and accordingly called upon him to enter his defence. The accused elected to give an unsworn statement from the dock. The defence of the accused as summarised by the trial judge are as follows:

On the night in question the accused went to the Gudang A.S. Logistic (the factory) riding a motorcycle belonging to his friend at the request of his friend one Adi Meru who had earlier called him on his mobile handphone. He was wearing a black T-shirt, brown coloured jacket and dark blue cotton trousers. He disputed and denied that he was wearing "jeans" on the night in question. Upon arriving at the front entrance of the factory at about 8.15 p.m. several Malay plainclothes policemen rushed at him and one of them took the motorcycle keys and another grabbed him and threw him on to the ground and asked him "mana barang?", "mana barang?". He was shocked and asked "barang apa? Saya tak ada apa-apa".

The policeman raised him from the ground and handcuffed both his hands at the back. He was then bodily searched and the policeman concerned put his hand into the pocket of the accused's trousers and jacket and denied that the policeman who bodily searched him put his hand on the front portion of his trousers. He stated that he was wearing a tight fitting trousers and it was impossible for anyone to put his hand into the front portion of his trousers. Nothing incriminating was found on him.

The police party then carried out searchers of the front and inside the area of the factory and the accused was placed on the back seat of a car parked within the factory area and guarded by another policeman who was seated beside him. As the car door was in an open position and the windscreen being down he could see and hear the conversation of the other policemen who were involved in the search conducted at the factory. A short while later he heard one of the policemen who was involved in the search shouting "Tuan sini ada barang". The accused saw the policeman shining his torchlight to a sport on the ground within the factory compound. The policeman who was seated with the accused pushed the accused's head downwards and closed the car door and the car was driven out of the factory. It is the accused's testimony that he did not see whether the policemen in the factory compound found or took anything from the ground.

The accused was then brought to IPD Klang and placed in a lockup until the next day. He was then brought to the Balai Polis Pandamaran and placed in the lock-up for 2 nights and 3 days. There were several Indians in the lock-up and one of them requested that the accused exchange the trousers the accused was wearing with his trousers as he liked the accused trousers which was neatly stitched. Initially the accused was reluctant to the exchange but on seeing that the Indian man became angry and coupled with the fact that there were several other Indians the accused became scared and exchanged his trousers with that of the Indian. The colour of the Indian trousers was blue and more or less of the same size with that of the accused.

During his incarceration at the Balai Polis Pandamaran nobody visited him and on the third day ie, 12.10.06 he was brought to IPD Klang for further investigation. At the IPD Klang the trousers of the Indian man which he wore in exchange was taken by the police and he was given to wear prison clothes.

It is the accused further testimony in his unsworn statement that from the time he was arrested in front of the factory until the date of trial herein he did not see nor was he shown either the incriminating drugs in P9 nor the jeans P18. He also denied being shown the Search List marked P12 and did not sign nor wrote his name in P12. Aside from his personal belongings namely the brown jacket and helmet and UNHCR card and his friend's motorcycle and the keys thereof he was not shown nor did he see the other exhibits tendered in Court.

The accused denied carrying and/or keeping the incriminating drugs marked P9 on any part of his body on 9.10.06 or for that matter anytime before and after the date. Prior to the charge herein he has never been arrested and/or investigated for any offence.

[4] Learned counsel for the accused in his argument before us had advanced a number of grounds of appeal. One of the grounds was that there was a conflict between the evidence of SP3, the leader of the raiding party and that of SP2, the chemist with regard to the description of the drugs P9 that was sent to her by the Investigating Officer SP5 for analysis. According to counsel the description of the drugs alleged to have been seized from the accused as given by SP5 and stated in various documents and also his oral testimony was as follows:

- Ketulan mampat
- Kertas timah
- Plastik lutsinar dan selotape

[5] The chemist, however, described the exhibit that she received from the Investigating Officer as follows:

- Plastik lutsinar
- Diperkuat dengan pita pelekat (masking tape)
- Kertas timah
- Plastik lutsinar dan pita pelekat

[6] And physical evidence of P9 that was tendered in court could be described as follows:

- Plastik lutsinar
- Diperkuat dengan pita pelekat (masking tape)
- Plastik lutsinar dan selotape

[7] In view of the above, counsel submitted that there were glaring discrepancies in the description of the drugs seized from the accused as given by SP5 and the description given by the chemist and produced in court as P9. The learned counsel submitted that what was sent to the chemist for analysis were not the same packages that were seized from the accused during the raid. According to counsel further it could also be that the packages had been tampered with or there was a mix-up of the packages at the Chemistry Department.

A **[8]** In fortification of this argument, learned counsel submitted further that the very size of the exh. P9 which measures 5.5 cm in width and 17.5 cm in length would make it impossible to be tucked in the tight and slim trousers worn by the accused. This led to doubt being created as to whether P9 was in fact recovered from the B accused. The doubt was further compounded by the fact that SP3 failed to state in the search list P12 that the drugs packages P9 were recovered from the accused trousers.

[9] As for the trousers P18 which the prosecution maintained as C the one worn by the accused at the time of arrest the defence gave a different story. According to the accused when he was arrested he was wearing cotton, tailored, slim fitting, tight pants. The cotton pants were not seized from the accused on the night of the arrest. Then he was taken to Pandamaran Police Station lock-up. Together D with him in the said lock-up was another Indian inmate who seemed to like the pants the accused was wearing. This Indian inmate pressured and forced the accused to exchange his pants with that worn by the inmate. Thus it was submitted for the accused that the pants P18 did not belong to him and it follows that the E said drugs could not have been recovered from the accused as it would not be possible for the drugs packages to be tucked in the trousers worn by the accused at the time of arrest. Instead, the accused claimed that the incriminating drugs was found by the raiding party in the factory's compound.

F **[10]** Another ground of appeal was that there was break in chain of evidence with regard to the movement of the drugs from the time of its recovery until it was sent to the Chemistry Department some two days later. It was submitted that the prosecution had in the trial failed to inform the court where the drugs was placed and G kept before it was finally handed over to the chemist for analysis. According to counsel there was high risk of tampering and mix-up with some other exhibits kept by the Investigating Officer in her steel cabinet.

H **[11]** Further ground of appeal was the failure of the prosecution to call evidence from a witness whom the defence alleged to be material to the case. This witness was the factory guard who according to the defence was standing at the guard house the spot where the search on the accused was done. This failure by the

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prosecution has given rise to two inferences that could either support or refute the accused's version. The one that is favourable to accused must be adopted by the trial judge. In this regard this court's attention was drawn to a decision of the Federal Court in *Chan King Yu v. PP* (Rayuan Jenayah No. 05-29-2005(W)). It reads:

> The burden was on the prosecution to check whether the appellant's version of the facts ... was true or false. The onus was upon the prosecution to disprove this important part of the appellant's version of facts.

[12] On the basis of the above principle it was submitted further for the defence that the learned trial judge did not have cogent evidential basis to accept prosecution's version of the drugs being found in the accused's pants. It is contended further that such failure should have created a doubt in the mind of the trial judge, the benefit of which should have been given to the accused.

[13] We now turn to consider the argument by the Deputy Public Prosecutor in response to the contention and argument of the counsel for the accused as aforesaid.

[14] Firstly, on the issue of the pants P18. It was argued for the respondent that the defence's version was highly improbable and it was not put to the prosecution's witness at the earliest possible opportunity ie, during cross-examination of the prosecution witnesses that the accused had exchanged his own pants with that of the Indian inmate while they were in the police lock-up. Hence the learned trial judge was convinced that P18 was the trousers worn and seized from the accused at the time of the arrest and it was not impossible for the drugs packages to be tucked underneath the jeans at the accused's belly region.

[15] Further, in rejecting the accused's version the learned trial judge had concluded that there was no reason to disbelieve SP3 and SP4 as to the manner the drugs was found.

[16] On the issue of whether the drugs that was produced in court as P18 was the same one that was seized from the accused at the time of the arrest, learned DPP suggested that SP3 and SP5 were not able to spell out the third layer of the packages as SP3 merely did a triangular incision on the packages to see its contents and all the witnesses ie, SP3 and SP5 had positively identified P9 as the drugs that was seized from the accused and later handed over to the

chemist for analysis. The chemist SP2 in her evidence had informed the court that P9 was the exhibit that she received from SP5 and handed back to him after analysis.

Findings Of This Court

[17] Scrutinising the grounds of the learned trial judge and the arguments advanced by both parties it is apparent that the central issue in this case is whether the drugs P9 which is the subject matter of the charge was recovered from the accused's person or from the factory compound as claimed by the accused. In addressing this issue the learned trial judge in his judgment had this to say:

> Learned defence counsel submits that the very nature of P9 measuring 17.5 cm in length, 10 cm in breadth and 5 cm in width makes it impossible and incredible for it to be placed underneath the trousers which is tight and slim fitting according to the Investigating Officer. Turning to the factual matrix herein upon evaluating the evidence of SP3 and supported by the evidence of SP4, I have no reason to disbelieve their evidence that the package P9 in the size aforesaid cannot be tucked underneath the trousers P17. It is also pertinent for me to emphasize that the Investigating Officer SP5 stated an evidence that the trousers marked P17 was tried on by the accused and it fitted him ... Hence at the stage of the prosecution's case upon evaluating the evidence of both SP3 and SP4, I have no hesitation in concluding that as P9 was found tucked underneath the accused's trousers, the accused was having custody and control of P9. Custody and control over P9 having been established by the prosecution the statutory presumption of knowledge under section 37(d) of the Act is activated and the accused is deemed to be in possession of 491 grams of cannabis contained in P9.

[18] However, the mere act of carrying is not sufficient to constitute the offence of trafficking. The learned trial judge, however, in his judgment has directed his mind to this issue when he stated in his judgment as follows:

> Section 2 of the Act lays down a host of activities which falls under the definition of trafficking and in the context of the case herein, the prosecution is relying on the words "keeping" and "carrying".
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> The prosecution had through SP3 and SP4 led credible evidence that the package P9 which contained the incriminating drugs was found on his person in that it was tucked underneath the trousers of the accused at the belly/groin region. The finding aforesaid through

> the application of the presumptive provision of Section 37(d) leads me to conclude that the accused was keeping and carrying the incriminating drugs within the meaning of Section 2 of the Act.

[19] Still on the issue of trafficking and as to whether the accused in the present case after having been found to be in possession of the incriminating drugs can be considered as doing an act of trafficking. Lord Diplock in *Ong Ah Chuan v. PP* [1980] 1 LNS 181 had this to say:

> To 'traffic' in a controlled drugs so as to constitute the offence of trafficking under Section 3 involves something more than passive possession or self-administration of the drug; it involves doing or offering to do an overt act of one or other of the kinds specified in paragraph (a) of the definition of "traffic" and "trafficking" in Section 2.
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> ... Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible – even if there were no statutory presumption such as is contained in Section 15 of the Drugs Act.
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> As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. All that Section 15 does is to lay down the minimum quantity of each of the five drugs with which it deals at which the inference arises from the quantity involved alone that they were being transported for the purpose of transferring possession of them to another person and not solely for the transporter's own consumption.

[20] Guided by the findings of the House of Lords as in the above passage, the learned trial judge has come to a conclusion that as the amount of drugs recovered from the accused in the present case is about 10 times more than the statutory minimum of 50 grams under s. 39A(2) of the Act, and there being no challenge made by

A the defence that the cannabis in question was for his personal consumption, the prosecution has successfully proven a *prima facie* case on the charge trafficking and the accused was accordingly called upon to enter his defence.

B **[21]** Upon defence being called the accused elected to give an unsworn statement from the dock. The gist of his defence is as mentioned earlier.

[22] The trial judge in making evaluation of the accused's defence *vide* his unsworn statement D20 has apparently addressed his mind C to the status and value to be attached to such a defence. In his judgment the trial judge said these:

> There appears to be divergent views on the evidential value of unsworn statement from the dock. One view is that an unsworn D statement from the dock is not evidence the rationale being the provision of Section 4(1)(a) of the Oaths and Affirmations Act explicitly requires the taking an oath to constitute "evidence" as defined in Section 3 of the Evidence Act – see *PP v. Sanassi* [1970] 2 MLJ 198; *PP v. Shariff Kadir* [1997] 5 CLJ 463.
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> E The other view is that an accused's unsworn statement from the dock is evidence where Chang Min Tat J in *Ng Hoi Cheu & Anor.* [1968] 1 MLJ 53, held that it is "evidence" from what it is worth and entitles the accused or his counsel to address the court. This was the view adopted by Low Hop Bing J (as he then was) in *PP* F *lwn. Tan Chee Kern & 1 Lagi* [2002] 1 CLJ 210.
>
> I am in favour of the second view in that the unsworn statement of the accused herein, which was marked as exhibit D20 is evidence for what it is worth and shall give it due consideration accordingly.

G **[23]** After scrutinising the defence statement of the accused, the learned trial judge in his judgment said this:

> I have scrutinised the evidence of both the prosecution's witness and the unsworn statement of the accused and it is my judgment that the contradictions strenuously portrayed by learned defence H counsel is not that material as to negative the prosecution's burden of establishing the charge beyond reasonable doubt.

[24] The accused's defence depended entirely on his credibility. Apart from his word there was no evidence that would support the I version of his story. Apparently the accused did not impress the trial judge as a truthful witness. On our part, we, too, had taken

the opportunity of scrutinising the accused's defence statement (D20). In our judgment the accused was not telling the truth and had invented his story to escape the consequences of his criminal act. We, too, therefore, rejected his defence and accordingly came to a finding and conclusion that the accused had failed to cast reasonable doubt on the prosecution's case.

[25] For the above reasons, we dismissed the appeal and affirmed the conviction and sentence passed by the trial judge.